

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1123

To be argued by
STEVEN LLOYD BARRETT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

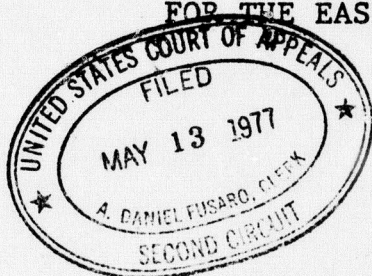
JOSE NUNEZ,

Defendant-Appellant.

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Docket No. 77-1123

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
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FOR THE EASTERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether Jose Nunez, whose limited knowledge of English is substantiated on the record, did not knowingly waive his constitutional rights prior to making an inculpatory statement to an agent, when the interview was preceded only by English Miranda admonitions.

2. Whether the trial court improperly admitted as evidence of prior similar acts testimony of three Secret Service agents which did not prove such acts, but both bolstered the credibility of other similar act testimony and obscured the distinctions made therein between Jose Nunez and the more culpable Benito Nunez.

3. Whether Jose Nunez was denied a fair trial by the Government attorney's summation, in which, inter alia, the defendants were attacked for having exercised constitutional rights and the jurors were inflamed by appeals to their prejudices.

4. Whether the maximum probation period imposable on a split sentence under 18 U.S.C. §3651 may not exceed the length of that portion of the original sentence which has been suspended by the court.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District Court of New York (The Honorable George Pratt, U.S.D.J.) entered on February 17, 1977, convicting appellant Jose Nunez, after a jury trial, of possession of counterfeit Federal Reserve notes with intent to defraud (18 U.S.C. §472). Appellant Nunez was sentenced to a term of three years' imprisonment, pursuant to 18 U.S.C. §3651, six months to be served in a jail-type institution, with execution of the remainder of the sentence suspended and appellant placed on probation for a period of four years, to commence upon his release from confinement.

By order of this Court, The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Appellant remains free on bail pending this appeal.

Statement of Facts

Appellant Jose Nunez and co-defendant Benito Nunez were jointly indicted for possession of counterfeit Federal Reserve notes with intent to defraud, in violation of 18 U.S.C. §472.

This charge related to the passing of six counterfeit \$50 bills and ten counterfeit \$20 bills to one Alan Miller in exchange for

several stereo components. Both defendants were taken into custody by the Secret Service after they had been arrested by New York City authorities; they were separately interrogated and each gave an inculpatory statement to a Secret Service agent. Following a pre-trial hearing, the statements were held admissible, and the defendants proceeded to a joint trial before Judge Pratt and a jury. The trial began on December 6, 1976, and ended with a guilty verdict against both defendants on December 9, 1976. Defendant Jose Nunez was sentenced on February 17, 1977, by Judge Pratt, pursuant to 18 U.S.C. §3651, to imprisonment for a term of three years; six months of that sentence were to be served in a jail-type institution, the balance of the sentence was suspended, and a probationary term of four years to be served after completion of the jail sentence was imposed. Execution of this sentence has been stayed pending appeal to this Court.

A. The Pre-trial Hearing on the Motion to Suppress

1. The Case for the Government

John Vezeris, a United States Secret Service agent, interviewed Jose Nunez in the interview room of the New York office of the Secret Service at approximately midnight, December 3, 1975.* Jose Nunez and co-defendant Benito Nunez had been

*Agent Vezeris' supervisor, James Heavey, was present intermittently, but did not participate in the questioning and did not testify for the Government.

brought to the New York office by other Secret Service agents and then separated for individual interviews. At the outset of his interview with Jose Nunez, Agent Vezeris advised his suspect of his constitutional rights. These rights were provided only in English (T.6-9*). After Agent Vezeris had completed his oral Miranda warnings, he placed a Secret Service form containing the same warnings in front of Mr. Nunez; this form was available in both English and Spanish versions, but Agent Vezeris provided only the English form (T.30-31). During Agent Vezeris' reading of the rights, Mr. Nunez neither said anything nor gave any sign of understanding (T.30), and when he was asked to sign the waiver on the rights form which was provided, he refused to do so (T.13).

At the conclusion of his reading of the rights, Agent Vezeris asked Mr. Nunez if he understood these rights and if he would be willing to answer questions. Mr. Nunez answered affirmatively to both inquires, and the interview proceeded in English (T.7-8). Testifying from memory, Agent Vezeris recounted the substance of his interrogation:

I had asked him about the note. I asked him if he had in fact been in possession and had passed the notes earlier that evening. He said that he did, to a gentleman in return for some stereo equipment. I asked him where he got the notes from. He told me he got the

*The minutes of the pre-trial suppression hearing and of the trial are numbered in sequence (suppression hearing, 1-286; trial, 286-1,063): Page references to this transcript are shown as numerals preceded by "T".

notes from an unidentified black male on the Saturday prior to that day. So I believe the Saturday was the second. And so it would have been the 29th. So this black male that he had made contact with was located at 125th Street and Lenox Avenue in New York, Manhattan. I tried to have him get more specific regarding the identity of the black male and regarding the circumstances of the purchase, but he would not be more specific. I asked him if he had dealt with this gentleman before. He said he had not. I asked him if he knew the notes were in fact counterfeit. He said that he knew they were counterfeit. He made this contact with this gentleman, but he refused to give me any details as to how he met the gentleman or how it was purchased.

(T.12-13).

Agent Vezeris noted that Mr. Nunez's statement was not in narrative form and that his account of the interview was comprised of "basic statements" rather than "exact words" (T.44). Though Agent Vezeris referred at some points to Mr. Nunez's statements of having "purchased" the counterfeit bills, he acknowledged that he did not recall that word having specifically been used and that Mr. Nunez might have indicated that he had "obtained" the notes (T.50). Agent Vezeris terminated the interview when he found that he was unable to learn more about the source of the counterfeit notes from Mr. Nunez; it was not that Mr. Nunez stated that he did not wish to answer any further questions on this subject, but that Mr. Nunez "hemmed and hawed" and failed to respond to the questions with substantive answers (T.53-54). The agent asserted that Mr. Nunez at no time complained that he did not understand English, but he admitted that he never

asked Mr. Nunez whether he was fluent in English (T.8, 39). Explaining why he had placed the English rather than the Spanish version of the waiver of rights form before Mr. Nunez, Agent Vezeris said, "I would not have known how to read the Spanish" (T.33).*

2. The Case for the Defense

Jose Nunez lived at 103 West 88th Street and worked as a handyman at 498 West End Avenue (T.96-97). Testifying through an interpreter,** Mr. Nunez stated that he understood "a little" English and that in his interview with Agent Vezeris, which was conducted in English, he understood some but not all of the agent's statements (T.98). Mr. Nunez recalled that, in addition to Agent Vezeris, who interviewed him, there was another agent present who spoke Spanish; this gentleman was the agent who took Mr. Nunez's picture and fingerprints. Noting that

*Robert H. Hast, also a Secret Service agent, interviewed co-defendant Benito Nunez at about the same time Agent Vezeris was interviewing Jose Nunez. This interview also was conducted entirely in English; however, Benito Nunez, though Hispanic like his cousin, Jose Nunez, admitted to fluency in English.

Agent Hast indicated that when a suspect is not fluent in English, it is the practice of the Secret Service to assign an agent able to communicate with the suspect rather than employ an interpreter (T.91). He stated that his office had Spanish-speaking agents but he believed that none was available during the interviews of Jose and Benito Nunez; "Otherwise they would have probably conducted the interview" (T.87-88).

**An interpreter was present at the defense table throughout the hearing and the trial to translate all testimony for Jose Nunez.

his recollection was affected by the "long time since then," Mr. Nunez described this agent as tall and white and having "blondish" hair (T.103). Agent Vezeris refused to have the interview conducted in Spanish and his own approach was coercive; the first statement he made to Mr. Nunez was, "Where did you get the money that you used to buy that stereo?", to which Mr. Nunez replied, "I got it from a man and truthfully I didn't know him" (T.104-105).

Mr. Nunez stated that Agent Vezeris did not advise him of his rights, or if he did, Mr. Nunez did not understand these warnings; he also did not learn of his rights from the waiver of rights form, and he refused to sign that form because he "didn't understand what was there in writing" (T.98, 116-118). He answered some of Agent Vezeris' questions in English as best he could and "yes" or "no" when appropriate, but he was unable to understand other questions, and so informed his interrogator (T.118, 124).

3. The Rebuttal for the Government

John Vezeris was re-called by the Government and testified that there were no agents in his office who had blond hair and spoke Spanish. Agent Vezeris stated that he fingerprinted Jose Nunez, and he was described as having black hair and being heavy-set (T.138).

Douglas Ferry, a Secret Service agent, and his partner, Agent Keller, took custody of Jose and Benito Nunez at the 61st

Police Precinct in Brooklyn late December 2, 1975. Agent Keller* advised them of their rights, but neither of the agents spoke to the suspects; it was nearly the end of their shift, and they decided to leave the questioning to other agents (T.150-153). The rights were given in English, and the suspects responded that they understood their rights (T. 153). Agent Ferry testified that the suspects did not converse in his presence, and he had no knowledge of any conversation while they were in Agent Keller's custody (T.168-171). The only words of either suspect heard by Agent Ferry were their simple affirmations of understanding at the conclusion of Agent Keller's recitation of the rights. Neither Agent Keller nor Agent Ferry spoke Spanish, and though Juse Nunez looked Dominican or Puerto Rican and answered Agent Keller with a Spanish accent, the officers were not concerned with their suspects' understanding of English because they intended no interrogation (T.170-175).

4. The Surrebuttal for the Defense

Jose Nunez was re-called and modified his description of the Spanish-speaking agent who photographed and fingerprinted him by explaining that his hair was not blond, but hazel or light brown (T.180, 186). He suggested that his initial statement that the agent's hair was "blondish" was an error of

*Agent Keller was in Russia at the time of this trial and was not available to testify.

language rather than one of observation (T.185-186).

5. The Supplemental Evidence for the Government

After the court denied the defense motion to suppress (see Part 6, infra), the Government attorney discovered that the state officers who initially took custody of the two defendants had interrogated them and that Jose Nunez had expressed his inability to understand English (T.212-213). In light of this new evidence, the parties agreed to re-open the hearing (T.217-218).

John Hunt, a detective with the New York City Police Department, testified that Jose and Benito Nunez were observed by a number of officers loading stereo equipment into their automobile and that they were brought to the police station to ascertain lawful ownership of the equipment. At the 61st Precinct, Jose Nunez indicated that he could not speak very much English, and Detective Hunt directed his inquiries to Benito Nunez. When the officers learned that the stereo equipment had been purchased with counterfeit bills, both suspects were placed under arrest and advised of their constitutional rights (T.219-222).

The officers themselves spoke English, and because Jose Nunez had expressed an inability to speak English, all commu-

*This evidence was presented subsequent to the arguments on the motion and decision on the motion to suppress, which are detailed in Part 6, infra.

nications with him were conducted through Benito Nunez, who acted as an interpreter. This technique was used to obtain Jose Nunez's pedigree information, and when an Officer Tanicko* read the suspects their rights, Benito Nunez translated them for Jose Nunez, though the exact process of this translation was not specified by the witness (T.226-228, 238-239). After the warnings, Benito Nunez made a statement to the effect that the counterfeit money had been purchased in Harlem on 125th Street (T.228). The "sum total" of Jose Nunez's statements were "that he didn't speak English" (T.236), though he was separately interrogated by both Officers Hunt and Tanicko (T. 227-228).

John Timko, another detective involved in the arrest of Jose and Benito Nunez, conversed in English with Benito Nunez; he did not recall having any conversation with Jose Nunez. He stated that there was a discussion between Jose Nunez and his partner, Lieutenant Solomon, but Detective Timko was unable to hear what was being said and did not know what language was being spoken or whether his partner spoke Spanish. During the drive to the police station, Detective Timko directed his conversation at both suspects, but was unable to remember who sat where or who spoke. He also did not recall whether he had any conversation with Jose Nunez at the station house (T.262-264, 274).

*Officer Tanicko was on vacation at the time of this trial and was not available to testify.

6. Arguments and the Decision on the Motion
to Suppress

Counsel for Jose Nunez argued that his client's inability to speak English rendered the Miranda admonitions given in English meaningless (T.187-192). He stated:

I don't think the Government has satisfied its burden of showing not only that he was given his rights, but that he was given his rights in such a fashion that they were meaningful to him, sufficient for him to waive those rights and to do so in a voluntary and knowing basis....

(T.192).

Following the presentation of the Government's supplemental evidence, counsel expanded on this point:

I think all the testimony that we have learned today has at least raised the proposition that my client is not sufficiently fluent in the English language, and I think the police officers, having recognized that, did not ask him directly whether he understood the constitutional rights, but conveniently for them, and I suppose for the Court, asked him through an interpreter, an interpreter who is a co-defendant.

... I have no way of knowing and I don't think this Court has any way of knowing whether or not in fact my client has received his constitutional rights, which is his right. I'm not satisfied that Benito Nunez's recitation of those rights, if in fact he recited them, raises it to the standard envisioned by the Supreme Court in the Miranda decision. It was convenient for the police officers to do so. But it was not appropriate for them to do so.

(T.281).

The court denied the motion to suppress, stating in part:

The real question is whether Jose in fact, understood the warnings which were given to him. Did he know what his rights were?

The defendant, Jose, acknowledges that he has some understanding of English. He denies that he understood any Miranda warnings that may have been given to him. The Government agent Vezeris testified that he conversed with him over a period of somewhere between ten and twenty minutes and he saw no indication that he did not understand. It really comes down to a question of whether I believe the Government agent or whether I believe Jose.

On that question, I find that I believe the Government agent. On several points I think Jose's testimony is incredible.... In addition to those points, Jose testified as to the first question which was put to him in English by the agent and he testified as to what his response was, in English. If he had the ability to understand that question and give that response in the English language, he certainly had the ability to understand Miranda warnings which were given to him twice.

(T.207-208).*

After hearing the supplemental evidence from the state officers, the court confirmed its earlier ruling: "I find the testimony of the Secret Service agents is credible and that of Jose on the question of whether or not he understood his Miranda rights, that his testimony is not credible; therefore, the motion is denied again" (T.285-286).**

*The full findings and conclusions, which appear at T.206-210, are set forth as D1 to the separate appendix to appellant's brief.

**The full findings and conclusions, which appear at T.285-286, are set forth as D2 to the separate appendix to appellant's brief.

B. The Trial

1. The Evidence Pertaining to the Crime Charged

Allen Miller, an 18-year old insurance broker trainee, endeavored to sell some of his stereo equipment by placing an advertisement in the Buy Lines of November 6, 1975, which listed his telephone number (T.334-337, 342). Mr. Miller received a phone call on that date inquiring about these items, and, after advising the caller that the advertised items had been sold, he offered him other stereo components for \$500. The person with whom Mr. Miller spoke identified himself as Joe and left a telephone number, which Mr. Miller later determined to be a wrong number (T.343-344).

Jose and Benito Nunez were admitted to Mr. Miller's apartment at about 8:30 p.m. on December 2. Mr. Miller demonstrated the stereo and the two men were satisfied; Jose Nunez took \$500 out of his jacket pocket, counted it, and handed it to Benito Nunez, who in turn counted it and then handed it to Mr. Miller (T.345, 348-350). The men asked for the instruction booklet, the guarantee, and other papers for the stereo equipment, but when Mr. Miller indicated that it would take him 15 minutes to locate these papers, the men said they could not wait (T.347, 352-353). They carried the equipment to their automobile, declining Mr. Miller's offer of assistance, and left. The entire transaction took about half an hour (T.354-355). One statement of Jose Nunez's that Mr. Miller recalled was in response to his

inquiry as to where Mr. Nunez had obtained such new bills; Mr. Nunez said that he had obtained the money at a "bank" (T.381-382).

After the men left, Mr. Miller spread the money on a table to look at it, and when he picked it up, it did not feel right. He then examined the bills more closely and discovered that several of them contained the same serial number, and he concluded that they were counterfeit. He contacted the Secret Service, and while he was on the telephone, received a call on another line from Detective Timko of the New York City Police Department inquiring about the sale of stereo equipment to Jose and Benito Nunez. Mr. Miller then informed the federal agent that the men who had passed the counterfeit bills had been apprehended by the police, and he proceeded to the 61st Precinct where he identified the defendants (T.356-357).

John Tinko, a detective with the New York City Police Department, observed Jose and Benito Nunez loading stereo equipment into their automobile on Nostrand Avenue at Avenue W. As they drove away, he followed them, and after six or seven blocks, he pulled them over, identified himself as a police officer, and inquired as to the ownership of the stereo equipment. They provided him with the telephone number of Mr. Miller, but were not able to produce a bill of sale, and the officer asked them to accompany him to the 61st Precinct to clarify the matter. The

officer drove their automobile to the station house with them in it. When they reached the police station, Detective Tinko

called the number given to him by his suspects, and Allen Miller informed him that he sold the stereo equipment in question but that it had been paid for in counterfeit bills (T.396-400).

James Hunt, a detective with the New York City Police Department, indicated that Officer Tanicko was the arresting officer and gave the suspects their Miranda warnings in English. Jose Nunez made it known to the officers that he was not fluent in English, and questions asked by Officer Tanicko in conjunction with his preparation of the arrest sheet were translated for Jose Nunez by Benito Nunez (T.417Q-417U). The arrest sheet provided, inter alia, the following information: Jose Nunez had been born in Santa Domingo; and, unlike Benito Nunez, who was a citizen, Jose Nunez was an alien (T.435-458, 443).

John Vezeris interviewed Jose Nunez after his fellow Secret Service agents, Doug Farahety and Brooks Keller, transported Mr. Nunez from the 61st Precinct to the New York office of the Secret Service. At the outset of the interview, Agent Vezeris advised Mr. Nunez of his constitutional rights in English, and the interview itself was conducted entirely in English and lasted 15 minutes (T.485-490). The interview revealed that Jose Nunez had passed the notes to Mr. Miller knowing that they were counterfeit, and that he had received the notes from a black man in the vicinity of 125th Street and Lenox Avenue the previous Saturday night (T.489).*

*The balance of Agent Vezeris' testimony ---comprising 160

Robert Hast, the agent who interviewed Benito Nunez, similarly provided the substance of Benito Nunez's statement to him:

... I asked him if he knew that the money that was passed in the purchase of a stereo -- for a stereo -- was counterfeit. He said he did. I asked him how the transaction took place. He said that his cousin, Jose, had given the counterfeit money to Allen Miller.

(T.654).

James Brown, a counterfeit expert for the United States Secret Service, testified that the bills allegedly passed by Jose and Benito Nunez were indeed counterfeit (T.862-875).

Edward Clay, the sole defense witness, was an investigator for The Legal Aid Society (counsel to Jose Nunez) and an ex-police officer with special training in the investigation of gambling offenses (T.880-881). His testimony was offered by the defense to suggest that Jose Nunez obtained the counterfeit \$500 through gambling (T.883). Mr. Clay, declared an expert by the court, explained that in three-number "policy", a bettor could pick one number for a return of eight to one, two numbers for a return of 40 to one, or three numbers for a return of 500 to one (T.885). Pertinent to Allen Miller's recollection that Jose Nunez had mentioned that he had obtained the new bills at a "bank," Mr. Clay defined "bank" as used in

(Footnote continued from the preceding page)

pages of the transcript (T.490-650) -- concerns facts introduced as evidence of a prior similar act, and is detailed in Part 2 of this section.

the gambling parlance: "It is the place where the money is distributed following the hit of a number..." (T.885).

2. The Evidence Offered as a Prior Similar Act

In an effort to establish a prior similar act, the Government presented the testimony of Ramonisto Perez. Mr. Perez testified to dealings with Benito Nunez between April and December 1976. With the exception of one allegation of Jose Nunez's involvement in these dealings -- an allegation which was expressly contradicted by information obtained from Mr. Perez and incorporated in a Secret Service report -- Mr. Perez's testimony detailed dealings with Benito Nunez alone.

Mr. Perez, 20 years of age, was studying at the Police Academy and had been an auxiliary policeman since he was 17 (T.702-703). In April 1975, Mr. Perez had been attending the ECPI -- a trade school concerned with various police practices including counterfeit control -- the tuition for which had been paid by a \$1,500 federal grant. One of his fellow students was Benito Nunez (T.704-705). After a week of course work devoted to counterfeiting techniques, Mr. Perez had occasion to discuss counterfeit bills with Benito Nunez; Benito Nunez showed Perez two \$50 bills, one of which was described as counterfeit. Mr. Perez asked how much was available, and Benito Nunez replied, "15,000, 30,000, just as much as I wanted." Benito Nunez promised to bring Mr. Perez a sample bill, and, on October 22, 1975, in the bathroom at ECPI, gave him a counterfeit \$50 bill.

Benito Nunez advised Mr. Perez that "if I have no problem in passing that he can give me a bigger package so I can pass it" (T.705-708). Mr. Perez placed the bill in his book and contacted the police, who in turn called the Secret Service (T. 714-715).

On November 19, 1975, on the basis of an earlier call to Benito Nunez from Mr. Perez, a meeting was arranged at Amsterdam Avenue and 88th Street for 4:00 p.m. Mr. Perez proceeded to 88th Street where, inside the restaurant, he met Benito Nunez, who introduced him to Jose Nunez. The three men entered Benito Nunez's car, drove a block, and parked in front of a garage, and Benito Nunez exited the car. Mr. Perez conversed with Jose Nunez, and when Benito returned, Jose Nunez produced three counterfeit notes from his jacket pocket and gave them to Benito Nunez (T.716-718). Benito Nunez handed them to Mr. Perez and then drove him to a station. After it was determined that the bills were counterfeit, Mr. Perez called Benito Nunez and told him that he had someone who wanted to purchase \$3,000 in the bills. Benito agreed, and they arranged to meet on December 2 at 6:00 p.m. in front of the restaurant, which Benito Nunez described as his "front" (T.741-742).

On December 2, Mr. Perez, accompanied by Special Agent Patrick McCool, met Benito Nunez inside the restaurant, where he was seated at a table; Mr. Perez recalled seeing Jose Nunez with several other persons seated at the counter. Mr. Perez and Special Agent McCool joined Benito Nunez at his table, and

at Special Agent McCool's suggestion, the three went outside to speak. The counterfeit money was not available at that time, but Benito Nunez assured Mr. Perez that the money would be available later that night, and Mr. Perez and Special Agent McCool left (T.741-744). Mr. Perez recalled that during the discussions outside the restaurant, Jose Nunez stood apart from them, about 18 to 20 feet away, "in front of the restaurant, on top of the stairs, practically looking out or listening to the conversation..." (T.744-745).

At the conclusion of Mr. Perez's testimony, Special Agent McCool's report was entered in evidence by the defense, with the Government's consent (T.860). Included in the report was a summary of Special Agent McCool's conversation with Mr. Perez regarding the three sample bills obtained on November 19. As previously noted, Mr. Perez stated that Jose Nunez had produced three bills (T.717-718); the report showed that Mr. Perez had told Special Agent McCool that he had received the three samples from Benito Nunez. Mr. Perez's response to this allegation was "I never said that" (T.833) and "I didn't tell him I received it from Benito Nunez" (T.835; 831-835).*

In addition to this evidence relating to prior criminal acts, the Government was permitted to offer extensive testimony

*Other evidence presented by the Government pertinent to this transaction was the testimony of James Brown, the Secret Service counterfeit expert (see Part A, *supra*), that the sample bills collected by Mr. Perez were all counterfeit and that they probably came from the same master negative as the other \$500 (T.873-873).

from three witnesses concerning the Secret Service investigation of the possible involvement of Jose and Benito Nunez in counterfeiting. This testimony provided background details for Mr. Perez's testimony.

John Vezeris, whose testimony on this matter was allowed over strenuous defense objections (T.491-501), testified that on November 19, 1975, he was parked in an unmarked car in the vicinity of 88th Street and Amsterdam Avenue. He observed the informant in conversation with both Jose and Benito Nunez. A short time thereafter, the agent's surveillance terminated (T. 505-506).*

Agent Vezeris, accompanied by Agent Hast, was again engaged in surveillance of Jose and Benito Nunez on December 2, 1975, at 88th Street and Amsterdam Avenue. He and Agent Hast were secreted in a surveillance van and observed the undercover agent, Special Agent McCool, and an informant, Mr. Perez, greeted at the entrance of the Companion D'Oro restaurant by Benito Nunez; Jose Nunez was seen inside the restaurant. A short time after, Special Agent McCool, Mr. Perez, and Benito Nunez left the restaurant and stood near Special Agent McCool's car; Jose Nunez was standing outside the restaurant, apart from

*Agent Vezeris was asked on direct examination whether he had ever conversed with either of the defendants. In response he indicated: "I don't remember the exact date, but there was an arrest of a prior defendant [neither of these defendants] in another case earlier that year or a month or so earlier -- I'd have to review the report for the exact date. At that time, when we made the arrest of this other individual, Benito Nunez was present in the apartment" (T.508-509).

the others but "apparently observing the conversation" (T.505).* Robert Hast confirmed the observations in his testimony (T.661). Agent Vezeris also testified that Special Agent McCool then walked to a telephone booth, made a call, returned to the car, and drove away with the informant. Benito Nunez then walked to a car and drove away; as to Jose Nunez, Agent Vezeris stated on direct examination that he joined Benito Nunez, but on cross-examination the agent stated that his best recollection, refreshed by his report, was that Jose Nunez remained standing in front of the restaurant as Benito Nunez drove away (T.502-505, 601-602).

Patrick McCool, the undercover agent who was present at the December 2 meeting, testified that he was introduced to Benito Nunez by Mr. Perez at the restaurant and discussed the sale of \$3,000 in counterfeit bills. Benito Nunez told him that the bills could not be delivered immediately, but he agreed to arrange a sale for 11:00 p.m. that evening (T.680-685). Special Agent McCool testified that Jose Nunez had exited the restaurant midway through the agent's conversation with Benito Nunez and stood in a doorway approximately 25 feet from them, doing "nothing more than stand there and watch our conversation" (T.486-487). The special agent was not introduced to Jose Nunez (T.694).

Counsel's objection to this aspect of the Government's case was registered in response to Agent Vezeris' testimony on

~~On re-direct examination,~~ *On re-direct examination, the Government attorney suggested that Jose Nunez was "a lookout on that occasion." The defense objection was sustained (T.629).

re-direct examination regarding the intended conclusion of the Secret Service investigation:

We had returned to the office and we were awaiting a telephone call to Special Agent McCool on our undercover line from the defendants so that later that evening we could meet with these defendants and Agent McCool could take delivery of the package that they had negotiated for earlier in the day, on the second.

(T.631).

In arguing for a mistrial, counsel stated:

The fact that the Government has evidence of previous dealings does not entitle the Government to go into the full panoply conducted by the Secret Service. I simply -- my client could not get a fair trial if this jury were to be infected with that kind of evidence.

(T.636).

The court agreed to direct the jury to disregard Agent Vezeris' testimony as being non-responsive to the question, but noting that "the information which he conveyed in that probably only anticipates the testimony of the informant....," the court denied the mistrial motion (T.640-641).

C. Excerpts from the Government's Summation*

At the outset of his summation, the Government's attorney informed the jury that, before turning to his review of the elements and the evidence, he wished to direct their attention

*The entire summation for the Government, which appears at T.917-960, is E to the separate appendix to appellant's brief. T.917-960

to the informant, Mr. Perez, and the treatment to which the defense had subjected him:

What happened to Perez on the stand? What did the defense try to do to Perez?

They knocked him. They cross-examined him. How many questions were asked? A hundred? A hundred and fifty questions? It's a mockery of a man who came forward and did what at least we hope every citizen in this country would do. He came forward with information about a counterfeiter, two counterfeiters. That, I submit to you, is the same thing as the conduct of the defendants in connection with this case. They dealt, possessed counterfeit money with impunity. The same way they tried to attack a person up there (indicating), a kid, a twenty-year-old kid, who is an auxiliary policeman.

(T.918-919).

Later, the Government's attorney offered a related comment:

Remember Mr. Goldberg's [co-counsel] question [to Mr. Perez], something about the community could be served, that is God going to be served? Remember that? Laughed at him. That's what they did, and who gets up there as one of the defense witnesses but a policeman. Who gets up there to stand up? They laugh at him when it comes time to prove the Government's case, but who did Mr. Asen [Jose Nunez's counsel] put on the witness stand but a police officer?

Sure, when it suits you to, do it one way. If it doesn't suit you do it the other way. That's an insult to an intelligent person.

(T.950-951).

At two points, the Government's attorney argued in a fashion suggesting that the defendants' failure to testify was evidence of their guilt:

Did the defendant's possess the money in question or can there be any question about it in

your minds?

There can't be. It was uncontradicted testimony at the trial that Jose and Benito possessed the money with Allen Miller.

(T.928-929).

You will listen to defense arguments. I ask you to remember at least one thing, the Government produced evidence at this trial, and plenty of it.

The defense is going to produce arguments, hypotheses and speculations.

(T.959-960).

The Government's attorney also reverted to unduly harsh and deprecative language on several occasions. He dismissed certain defense evidence as "ludicrous" (T.929); and addressing the caution utilized by the defendants in the dealings with Allen Miller, the Government's attorney concluded that this proved the defendants to be "criminals of the first order" (T.930).

With regard to one matter, the Government's attorney asserted a fact designed to depict the defendants as morally reprobate, which was false. The evidence had shown that Mr. Perez had received a \$1,500 federal grant to attend a program teaching various police practices -- the ECPI -- but it was never contended that defendant Benito Nunez had received a similar grant. Nevertheless, the Government's attorney charged this defendant with exploiting that grant at two points:

You know, there's another coincidence in this case, which I don't want to slip my mind. That has to-do with the fact where does Benito Nunez

get involved with the "informant" in this case? At a program subsidized -- a loan of \$1500, made by the United States Government.

He goes and takes a program, takes \$1500 from the United States Government to learn how to learn the ins and outs of counterfeiting and here he stands, charged by the United States Government for that crime.

Takes the Government's money to learn how to commit crimes against the Government.

(T.937).

Sure, Benito knew about counterfeiting. I submit to you he probably knew -- well, the Federal Government, he was taking the Federal Government loan to learn about counterfeiting.

(T.950).

Finally, at both the beginning and end of his summation, the Government's attorney sought to emphasize the importance of this case through mischaracterization and overstatement. First, he spoke about the grave social impact counterfeiting has on the entire community and attempted to direct the jury's passions against the defendants:

You get up in the morning at seven o'clock, go to work, earn money, pay for your children's education, if you have children. You worry about paying the landlord. You're worrying about living in our society, a society which was built upon the economics of the dollar bill, not a phony dollar bill, a real dollar bill.

What is counterfeiting? It goes to the heart of the very economic system that we all live under. That's what this case is all about.

...

Some people earn money, are satisfied in life. They work, they go through the trials and

tribulations, the anxieties, the depressions of life to support themselves and their family.

You worry about retirement, that you should have enough to live with, enough to buy food.

Other people aren't happy with [their lot].

(T.921).*

Second, he concluded his remarks by imputing to the jury ameliorative powers and duties:

I ask you to do one more thing. I ask you on behalf of the United States to bring in a verdict of guilty in this case so that notice will go out to the world to whomever that counterfeit money and possession of counterfeit money will not be tolerated in this country at any time. And by your verdict in this case I am confident sufficient notice will go forth so that those who act like the Nunezes did with impunity will be stopped and others will be prevented from breaking at the very jugular of our economy -- dealing with phony counterfeit bills and fraudulent securities of the United States.

(T.960).**

*At this statement, defense counsel noted his objection and requested a side-bar conference. He contended that: "Mr. Teitler's tactic here is highly inflammatory. It bears no relation to the evidence of the case. These are not inferences that one can draw. The defendants are not on trial for counterfeiting. It's a counterfeit possession case" (T.922). It is notable that this incident occurred early in the summation and it was counsel's second objection; no subsequent objections to the statements we have excerpted were registered because at this point the court said, "Before you begin, I don't look kindly upon objections to summations" (T.921).

**After the jury was taken out, defense counsel moved for a mistrial because the last quoted remarks were "about the most prejudicial thing that a prosecutor for any federal or state authority could bring in, to ask the jury to bring in a verdict of guilty on behalf of the United States so that the word will go forward. That is not the purpose of a verdict of guilty. The purpose of the verdict, as Mr. Teitler knows, is because

D. Verdict and Sentence

The jury returned a verdict of guilty against both Jose and Benito Nunez (T.1058-1059).

Jose Nunez appeared for sentence on February 17, 1977.

The court pronounced sentence as follows:

Pursuant to 18 U.S. Code, Section 3651, it is adjudged that the defendant is hereby committed to the custody of the attorney general or his authorized representative for imprisonment for a term of three years and on condition that the defendant be confined in a jail type treatment or institution for a period of six months.

The execution of the remainder of the sentence of imprisonment is hereby suspended and the defendant is placed on probation for a period of four years, to commence upon defendant's release from confinement.

(Minutes of Sentence at 4-5).

(Footnote continued from the preceding page)

he has established the guilt beyond a reasonable doubt" (T.961). Counsel also joined his co-counsel's objection to the Government attorney's comment on the defendant's failure to testify (T.961-962). The defense motion for a mistrial was denied (T.962).

ARGUMENT

Point I

JOSE NUNEZ, WHOSE LIMITED KNOWLEDGE OF ENGLISH IS SUBSTANTIATED ON THE RECORD, DID NOT KNOWINGLY WAIVE HIS CONSTITUTIONAL RIGHTS PRIOR TO MAKING AN INCULPATORY STATEMENT TO AN AGENT, WHEN THE INTERVIEW WAS PRECEDED ONLY BY ENGLISH MIRANDA ADMONITIONS.

Miranda warnings must be given to every suspect at the commencement of custodial interrogation, but it is beyond cavil that the warnings alone are not sufficient to satisfy the requirements for waiver of the constitutional rights to remain silent and to an attorney's immediate assistance. The raison d'être of Miranda v. Arizona, 384 U.S. 436 (1966), is the assurance that a suspect, before relinquishing his rights, is aware of them. A waiver of the rights will be knowing and intelligent, as required by Johnson v. Zerbst, 304 U.S. 458 (1938), only if the warnings as given can induce the suspect's understanding and awareness.* Jose Nunez did not knowingly

*Johnson v. Zerbst, supra, was cited in Miranda v. Arizona, supra, at 475.

In Schneckloth v. Bustamonte, 412 U.S. 218 (1973), the Court reaffirmed that custodial interrogation could proceed only after Johnson v. Zerbst waiver. Id. at 240. Though there has been a reluctance to interpret the requirement of understanding as necessitating a subjective determination of whether a particular defendant actually understood his rights, see, e.g., United States v. Frazier, 476 F.2d 891 (D.C. Cir. 1973) (en banc), cert. denied, 414 U.S. 911 (1974), there is no question that "the Government's burden of proof includes, in addition to the fact of such a warning a showing -- if the issue is raised -- that the person warned was capable of understanding it," United States v. Frazier, supra, at 896.

waive his constitutional rights; the evidence below established that his knowledge of English was limited, and English Miranda warnings were not adequate to assure his full understanding of his rights.

The court below attempted to resolve this question as one involving only credibility:

It really comes down to a question of whether I believe the Government agent or whether I believe Jose.

On that point, I find that I believe the Government agent.... Jose testified as to the first question which was put to him in English by the agent and he testified as to what his response was, in English. If he had the ability to understand that question and give that response in the English language, he certainly had the ability to understand Miranda warnings which were given to him twice.

The factual findings of the trial court that Mr. Nunez responded to English questions in English or that on a number of tangential matters Mr. Nunez's testimony was incredible are not contested.* However, even assuming everything said by the Secret Service agent to be true, his testimony did not satisfy the Government's "heavy burden" of proving that Mr. Nunez understood his rights (Miranda v. Arizona, supra, at 475). Agent Vezeris did not claim he determined that Mr. Nunez was able to

*The court cited two points on which he found Jose Nunez's testimony incredible, but neither of the examples pertained directly to Mr. Nunez's claim that he was unable to understand the Miranda warnings because of his limited knowledge of English (see T.206-210).

understand English sufficiently to comprehend the Miranda warnings; indeed, he acknowledged that his choice of an English rather than a Spanish waiver of rights form was based not on his belief in Mr. Nunez's fluency in English but on his own inability to read the Spanish (T.33). Nor did he maintain that he gave the warnings in a meticulous fashion -- "reading from a standard form and then pausing after each sentence to explain the meaning of the words and to inquire if appellant understood what was being read"* -- which might independently prove that the warnings truly were understood.

Thus, it is not the credibility of what Agent Vezeris said that is determinative here; it is what he failed to do that shows he did not adequately advise Mr. Nunez of his rights.

Also without logical support is the court's finding that Mr. Nunez's response to Agent Vezeris' first question in English proved that he was fully informed of his rights. The ability to respond to certain questions in English regarding criminal activity does not establish the ability to understand English Miranda warnings sufficiently well to permit a knowing and intelligent waiver of one's constitutional rights. First, is the question of whether the nature of the interview evinces a knowledge of English advanced enough to understand fully the right to silence and to the immediate assistance of counsel.

Agent Vezeris' description of the interchange shows no such

*United States v. McPherson, 436 F.2d 1066, 1067 (5th Cir.), cert. denied, 402 U.S. 997 (1971).

knowledge of English: Mr. Nunez did not give a narrative statement; much of the interview called for "yes" or "no" responses from Mr. Nunez; Mr. Nunez may have made very few statements in sentence form; the exact language used by Mr. Nunez was not recalled or committed to writing; and the interview terminated when Mr. Nunez proved unresponsive -- Agent Vezeris assumed that this was deliberate -- to certain questions (T.12-13, 53-54). The most that can be concluded from this evidence is that Mr. Nunez had a limited knowledge of English; but there is no evidence of fluency, and the unresponsive attitude of Mr. Nunez may indicate, contrary to Agent Vezeris' opinion, that Mr. Nunez was having difficulty understanding the questions. Second is the question of whether a limited knowledge of English permits an understanding of the warnings with sufficient precision to execute a valid waiver. Though the words of the Miranda decision are not a "ritualistic formula which must be repeated without variation in order to be effective," it is necessary to "convey the substance of the warning with the required information." United States v. Vanterpool, 394 F.2d 697, 698-699 (2d Cir. 1968). In Wainwright v. LaSalle, 414 F.2d 1235, 1237-1238, 1239 (5th Cir. 1969), the court held a pre-Miranda confession involuntary under the totality of the circumstances, and expressly cited as "a fact of critical significance" the failure effectively to advise Mr. LaSalle of

counsel and his right to counsel and to remain silent (id. at 1269); Mr. LaSalle, it was noted, had difficulty communicating in English,

and the court cited as one factor the inadequacy of warnings given by English-speaking officers.* Even if the warnings given to Mr. Nunez in English were accurate, Mr. Nunez's difficulty with English might have prevented him from understanding such subtleties as his right to the immediate presence of counsel; certainly this refinement to the bare right to counsel, which has long been viewed as a substantial distinction between adequate and inadequate warnings by this Court (see, e.g., United States v. Fox, 403 F.2d 97, 100 (2d Cir. 1968)),** might not be clear to a Spanish-speaking individual advised of his rights in English.

The question of the adequacy of English Miranda warnings given a defendant with only a limited ability to converse in English is analogous to the question of a defendant's right to an interpreter at trial, a matter this Court has considered. United States ex rel. Negron v. State of New York, 434 F.2d 386 (2d Cir. 1970). Finding the Spanish summarization of English-speaking witnesses' testimony no substitute for simultaneous translation of all testimony into Spanish, this Court

*The court also was concerned that the warnings given may have been inaccurate or possibly not given at all. Thus, reversal was not exclusively attributable to the fact that the warnings were not given in Spanish.

**Other circuits are in accord. See, e.g., United States ex rel. Williams v. Twomey, 467 F.2d 1248 (7th Cir. 1972); United States v. Garcia, 431 F.2d 135 (9th Cir. 1970); Smith v. Rhay, 419 F.2d 160 (9th Cir. 1969); Lathers v. United States, 396 F.2d 524, 535 (D.C. Cir. 1968); Windsor v. United States, 389 F.2d 530, 533 (5th Cir. 1968); Findley v. United States, 384 F.2d 923 (5th Cir. 1967).

observed,

Particularly inappropriate in this nation where many languages are spoken is a callousness to the crippling language of a newcomer to its shores, whose life and freedom the state by its criminal processes chooses to put in jeopardy.

(Id. at 390).

These words are equally applicable to the defendant brought before an officer of the State for interrogation; for just as a defendant at trial must be able to understand "the precise nature of the testimony against him" (id. at 389), a defendant in custody must be able to comprehend the precise nature of his constitutional rights of silence and counsel. Negrón itself makes an interesting analogy between a language disability at trial and a mental disorder preventing a defendant from participating at trial; both are viewed as forms of incompetence which, until cured, defeat any attempt at prosecution. A like analogy can be made between a language disability which prevents a defendant from understanding fully Miranda warnings read in a foreign tongue and a mental disorder preventing a defendant in custody from understanding his rights; just as a mentally incapacitated person cannot effectively waive his rights (see, e.g., United States v. Silva, 418 F.2d 328, 330 (2d Cir. 1969)), a defendant with a language disability cannot waive rights he may not understand.

That Mr. Nunez did not understand the advice he was given in English is substantiated by the record. Two factors in particular, not discussed by the trial court in reaching its

conclusion, signaled Mr. Nunez's genuine difficulty with the Miranda warnings: his refusal to sign the waiver of rights form and his consistent and expressed need for the assistance of an interpreter.

A written waiver of one's constitutional rights is not necessary to substantiate the validity of a waiver, but "the refusal to execute a written waiver may be taken as an indication that no waiver was intended or freely given." United States v. Boston, 508 F.2d 1171, 1175 (2d Cir. 1974).^{*} In view of Mr. Nunez's limited knowledge of English, it is likely that the inconsistency between his refusal to sign and his willingness to speak is indicative of his confusion regarding his rights. Perhaps he believed that only signed statements could be used against him, contrary to the information provided in the second Miranda warning, or perhaps he did not know that he could refuse to answer Agent Vezeris' oral questions, contrary to the information provided in the first Miranda warning. But in any event, the inconsistency of his conduct is an important indication that Mr. Nunez did not understand the oral and written warnings he received. This fact should be viewed in conjunction with Mr. Nunez's consistent reliance on inter-

^{*}Two minority views accord even greater significance to the refusal to sign a waiver form: one is that the refusal increases the burden of the Government to establish the validity of a subsequent oral waiver (United States v. Nielsen, 392 F.2d 849 (7th Cir. 1968)); the other is that a refusal to sign the waiver form terminates the interrogation until the suspect initiates further conversation (United States v. Hopkins, 433 F.2d 1041 (5th Cir. 1970)).

preters. At the various court appearances -- most notably, the suppression hearing and the trial -- Mr. Nunez required an interpreter giving simultaneous translation. Moreso, when the New York City police sought to interrogate him after his arrest, he expressed his inability to speak English, and the only means by which the police were able to obtain the pedigree information was through the two-way translation provided by Benito Nunez. Though this is not independent confirmation of Mr. Nunez's inability to converse in English, it would have been a pointless guise for him to assume; if he did speak English, he would have understood the Miranda warnings and realized that no deception would be necessary to permit him to maintain his silence. Furthermore, the New York police arranged to have Benito Nunez translate the Miranda warnings for Jose Nunez as they were being read; though the record offers no assurance that Benito Nunez's translation was accurate, it is noteworthy that Jose Nunez, in the interrogations which followed, chose to make no statement to the police. This supports our contention that his statement to Agent Vezeris was elicited because Mr. Nunez was not aware of his rights at that interrogation.

A defendant's incriminating statement to an arresting officer often plays a central role in the subsequent prosecution, and this case is one in point; the Government's proof on the elements of knowledge and intent on the part of Jose Nunez -- as distinct from co-defendant Benito Nunez (see Point II, infra) -- was scant, and Mr. Nunez's statement to Agent Vezeris

was no doubt highly regarded by the jury. The fact that the post-arrest interrogation was consequential compelled him to insure that Mr. Nunez was aware of his constitutional rights before a putative waiver was accepted. The existence in New York of a substantial Hispanic population who, notwithstanding a limited familiarity of English, are truly fluent only in Spanish, was not beyond Agent Vezeris' experience. Moreover, the provision of Miranda warnings in Spanish is no longer a novelty; the Secret Service has printed waiver of rights forms in Spanish, the American Bar Association has concluded that a "defendant cannot make [an intelligent and uncoerced choice to have counsel present] if the offer is made in a language which he does not understand,"* and police efforts to give Miranda warnings in Spanish have been noted with approval by the courts.**

The failure to provide Spanish Miranda admonitions to Jose Nunez prevented him from understanding fully his constitutional rights, and a new trial should be granted at which Mr. Nunez's statement will be suppressed.

*ABA Standards Relating to Providing Defense Services 62
(Approved Draft, 1968).

**See, e.g., United States v. Pomares, 499 F.2d 1220, 1221-1222 (2d Cir.), cert. denied, 419 U.S. 1032 (1974); United States v. Caramian, 468 F.2d 1369, 1370 (5th Cir. 1972).

Point II

THE TRIAL COURT IMPROPERLY ADMITTED AS EVIDENCE OF PRIOR SIMILAR ACTS TESTIMONY OF THREE SECRET SERVICE AGENTS WHICH DID NOT PROVE SUCH ACTS BUT BOTH BOLSTERED THE CREDIBILITY OF OTHER SIMILAR ACT TESTIMONY AND OBSCURED THE DISTINCTIONS MADE THEREIN BETWEEN JOSE NUNEZ AND THE MORE CULPABLE BENITO NUNEZ.

Evidence of the defendants' participation in the passing of counterfeit money other than the incident for which they were indicted and tried was concededly proper. FED.R.EVID. 404(b). Nevertheless, this did not give the Government a carte blanche to offer extensive evidence not of prior criminal acts but of suspicious activities suggesting Jose Nunez's involvement in a large-scale counterfeiting scheme. Notwithstanding the admissibility of another crime, wrong, or act pursuant to FED.R.EVID. 404(b), the express language and underlying policies of FED.R.EVID. 403 and numerous decisions of this Court* and other United States Circuit Courts of Appeals** preclude excessive and unnecessary evidence which, though having some bearing on the prior act, is not directly pertinent

*See, e.g., United States v. Leonard, 524 F.2d 1076, 1092 (2d Cir. 1975); United States v. Deaton, 381 F.2d 114, 117 (2d Cir. 1967); United States v. Byrd, 352 F.2d 570, 574-575 (2d Cir. 1965).

**See, e.g., United States v. Ring, 513 F.2d 1001 (6th Cir. 1975); United States v. Goodwin, 492 F.2d 1141, 1150-1151 (5th Cir. 1974); United States v. Woods, 484 F.2d 127, 134 (4th Cir. 1973); United States v. Finch, 470 F.2d 1234, 1240 (D.C. Cir. 1972), cert. denied, 410 U.S. 909 (1973); United States v. Stirone, 262 F.2d 571 (3d Cir. 1958), rev'd on other grounds, 361 U.S. 212 (1960).

to the question -- such as knowledge or intent -- actually before the court and jury. Thus, it was error to permit the Government to elicit the testimony of three Secret Service agents which did not prove a prior similar act, but which did bolster the credibility of other similar act testimony while obscuring the true impact of that testimony.*

In the case proper, Jose Nunez was accused of having possessed \$500 in counterfeit bills with intent to defraud. The evidence upon which this charge was based alleged that Mr. Nunez passed \$500 in counterfeit bills to one Allen Miller in exchange for some stereo equipment. Evidence establishing Mr. Nunez's knowledge and intent was relevant, and we find no error in the trial court's decision to permit evidence that Mr. Nunez, or his similarly-charged co-defendant, Benito Nunez, had knowingly possessed counterfeit notes at a previous time. Thus, the testimony of the informant, Mr. Perez, was admissible.

Mr. Perez was the sole witness presented by the Government on this matter who testified to having observed the defendants in possession of counterfeit bills. His testimony specified four dates: (1) on April—, 1975, Benito Nunez showed Mr. Perez a counterfeit \$50 bill; (2) on October 22, 1975, Benito Nunez gave Mr. Perez a counterfeit \$50 bill as a

*Although the court charged the jury that evidence of the defendants' prior similar acts was relevant to their knowledge and intent but not to their character (T.1033-1035), this instruction was not germane to the testimony of the three Secret Service agents; their testimony did not establish a prior similar act, and its prejudicial effect was different than that addressed in the charge, so the court's instruction was not applicable to, and did not offset, the testimony in question.

sample; (3) on November 19, 1975, Mr. Perez was in the company of Jose Nunez and Benito Nunez, and received three more sample counterfeit bills -- this time from Jose Nunez, though the Secret Service report of Special Agent McCool, who was briefed by Mr. Perez, indicated that these bills were passed by Benito Nunez; and on the same date, he had a telephone conversation with Benito Nunez in which he arranged the purchase of \$3,000 in counterfeit bills at a subsequent date; (4) on December 2, 1975, Mr. Perez met Benito Nunez at a restaurant pursuant to their arrangement for the delivery of the counterfeit money, and when the delivery was cancelled, Mr. Perez and Benito Nunez (and Special Agent McCool, who was also present) agreed to delivery later that evening; during these discussions, Jose Nunez was inside the restaurant at the counter or outside the restaurant on the steps, but he at no time joined the discussions.

Had the Government rested with the testimony of Mr. Perez, the jury would have been presented with allegations of prior conduct consistent with the Government's claim that, at least with regard to Benito Nunez, there was knowledge and intent to defraud in the subsequent transaction; and whether or not the jury believed this witness and how much weight they allowed his allegations would have been determined without unfair

influence by irrelevant facts. The Government did not limit its proof to Mr. Perez's testimony, however, notwithstanding that it was Mr. Perez alone who was able to testify to the

actual occurrence. Also presented were Secret Service Agents Vezeris, Hast, and McCool, whose testimony, with minor variations in detail, provided an inflammatory picture of Jose Nunez's participation in counterfeiting. This testimony, though it supported Mr. Perez's claim that he had been with Benito Nunez on the dates in question and had spoken to Jose Nunez on November 19, did not confirm Mr. Perez's allegations of dealings with counterfeit bills and was therefore not actual evidence of a prior similar act. Thus, it does not qualify as "evidence of other crimes, wrongs, or acts."

Moreso, the testimony of these additional witnesses was unduly prejudicial in several respects. First, through various allegations in the testimony -- such as Agent Vezeris' statement that he had observed Benito Nunez in the apartment of a suspect who was arrested on another case, or the conclusions of all three agents that Jose Nunez was watching and listening to the conversation between Mr. Perez, Special Agent McCool, and Benito Nunez, or the suggestion of the Government's attorney during examination of Agent Vezeris (stricken pursuant to a defense objection) that Jose Nunez was acting as a "lookout on that occasion" -- the Government utilized these witnesses to bolster the informant's allegations. Second, the fact that these three witnesses were agents of the United States Secret Service encouraged the inference that the defendants were so heavily involved in counterfeiting as to require Government surveillance -- prejudicial, though not similar act, evidence.

But perhaps the greatest harm to Jose Nunez attributable to these three witnesses was the resulting convergence of the evidence against Benito Nunez with that against Jose Nunez. Mr. Perez's testimony alone was focused on Benito Nunez's involvement -- from his initiation of the subject of counterfeit bills to his promise to have a package of \$3,000 for Mr. Perez. His allegations against Jose Nunez were limited to having seen him on December 2 -- when Jose Nunez was seated at the counter of a restaurant one block from his home and when he was standing outside the restaurant, some 20 feet from the conversations with Benito Nunez -- and having received three sample counterfeit bills from him on November 19 -- a claim which was expressly contradicted by Special Agent McCool's report, based on Mr. Perez's statements to him, that it had been Benito Nunez who handed him the three bills. Thus, under Mr. Perez's testimony alone, the jury would have been more than justified in finding that Jose Nunez had not committed a prior similar act and that, when he passed the \$500 to Allen Miller, he had neither knowledge of the counterfeit nature of the money nor intent to defraud Mr. Miller. But by the time the jury heard Mr. Perez's testimony, such distinctions were no longer possible; the three agents had directed their testimony to both defendants whom the agents, having no knowledge of what actual criminal acts had occurred, viewed as indistinguishable, and the Government's attorney repeatedly (and over counsel's objection) referred to the two defendants as "the Nunezes."

The evidence of a prior similar act was thus merged with a mass of misleading allegations. This evidence should have been strictly limited to actual proof of the acts in question to assure sufficient probative value to outweigh the prejudice this testimony caused. Jose Nunez, who was seriously harmed by the introduction of this evidence, should be afforded a new trial.

Point III

JOSE NUNEZ WAS DENIED A FAIR TRIAL BY THE GOVERNMENT ATTORNEY'S SUMMATION, IN WHICH, INTER ALIA, THE DEFENDANTS WERE ATTACKED FOR HAVING EXERCISED CONSTITUTIONAL RIGHTS AND THE JURORS WERE INFLAMED BY APPEALS TO THEIR PREJUDICES.

The summation of the Government attorney in this case should have been an occasion to put the case in its true perspective, delineating the evidence and analyzing its strengths. This prosecutor, however, used the summation to launch a series of heated attacks upon the defense and appeals to the passions of the jurors that were unjustified and totally inappropriate.* See Berger v. United States, 295 U.S. 78, 88 (1935); Hall v. United States, 419 F.2d 582, 583-584 (5th Cir. 1969).

The two most blatant instances of prosecutorial misbehavior occurred at the very beginning and at the very end. The jurors, attentive to the first arguments they were to hear, were told that the defense had acted improperly in conducting their cross-examination of the informant, Mr. Perez, and that the close cross-examination was "the same thing as the conduct of the defendants in connection with this case. They dealt, possessed counterfeit money with impunity. The same way they tried to attack a person up there (indicating), a kid, a twenty-year-old kid, who is an auxiliary policeman" (T.918-919).

*Relevant excerpts of the summation are set forth in the Statement of Facts, Section C; the entire summation is E to the separate appendix to appellant's brief.

These comments attributed to the defense -- and to the defense defendants--- a corrupt motive and sought to create an inference that the lengthy cross-examination of a Government witness established the defense's desire to mislead the jury and to mask the truth. Cf. Berger v. United States, supra, 295 U.S. at 88. This constituted an attack on the defense for having exercised a fundamental constitutional right.* "Full and fair cross-examination is the cornerstone of the adversary system. As Dean Wigmore has stated, cross-examination is 'beyond any doubt the greatest legal engine ever invented for the discovery of the truth.'" United States v. Fitzpatrick, 437 F.2d 19, 23 (2d Cir. 1970).** Certainly the exercise of a fundamental constitutional right, lying at the cornerstone of an adversary system, and directed primarily at the elicitation of truth is not defense conduct from which a negative inference of corruption and criminal conduct should be drawn.

The Government attorney's final statements, which provoked a defense mistrial motion, were an invective against all counter-

*In Parker v. Gladden, 385 U.S. 363, 364-365 (1966), the Supreme Court noted: "We have followed the 'undeviating rule,' Shepard v. Maxwell, 384 U.S. 333, 351 (1966), that the rights of confrontation and cross-examination are among the fundamental requirements of a constitutionally fair trial. Kirby v. United States, 174 U.S. 47, 55, 56 (1899); In re Oliver, 333 U.S. 257, 273 (1948); Pointer v. Texas, 380 U.S. 400 (1965)."

**The statement attributed to Wigmore is cited by the Court to a quotation in Stryker, THE ART OF ADVOCACY, 73 (1954). The Court's further discussion at 23 and n.2 is of further enlightenment on this matter. See also People v. Becker, 210 N.Y. 274, 305 (1914).

feiters. Echoing his earlier remarks in which he had distinguished the good citizens who "earn money [and] are satisfied in life" from counterfeiters, and in which he had argued,

What is counterfeiting? It goes to the heart of the very economic system that we all live under. That's what this case is all about [,]

the Government's attorney told the jurors that their verdict would give "sufficient notice ... so that those who act like the Nunezes did with impunity will be stopped and others will be prevented from breaking at the very jugular of our economy ..." (T.921, 960). As counsel noted, the jury's purpose was not to serve notice on other lawbreakers, but to weigh the evidence presented and determine whether the proof against one accused person established his guilt beyond a reasonable doubt. When a prosecutor concludes his summation with reference to the "others" whose criminal conduct would be combatted rather than to the evidence against the accused defendants, one may fairly conclude that the substitution of community outrage for the reasonable doubt standard was his intention.

The words of Berger v. United States, supra, 295 U.S. at 88, are familiar:

It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

When a jury is brought into a case not as a fact-finder but as a victim, a "wrongful conviction" is likely. In a clearly

analogous situation, this Court held remarks to a jury in an income tax evasion case which "asked the members of the jury to consider the fact that they as citizens carry an additional burden when someone does not pay his taxes" to be improper. United States v. D'Anna, 450 F.2d 1201, 1205-1206 (2d Cir. 1971); see also People v. Gioia, 286 App.Div. 528, 530 (N.Y. App.Div., 1st Dept. 1955).

Other comments of the Government attorney on summation contributed to the unfair nature of the trial. He accused the defense of hypocrisy because the defense attorneys derided Mr. Perez in their cross-examination of him, but later presented a defense witness who had been a policeman: "Sure, when it suits you, do it one way. If it doesn't suit you do it the other way. That's an insult to an intelligent person" (T.950-951). Not only did these statements recall the earlier criticism of the defense exercise of the right of cross-examination, but they are comparable to those condemned by this Court in United States v. Gonzalez, 488 F.2d 833, 836 (2d Cir. 1973), and which contributed to the reversal in that case:

The prosecutor characterized appellant's defense as a "pack of lies," "an insult to your intelligence," and "a concocted defense." Furthermore, he made derogatory comments about appellant's trial counsel's successful objection to the evidence.

(Id. at 836; emphasis in the original).

The comments here and in Gonzalez were directed against the defense as an entity, rather than against the evidence.

Another notable impropriety was the argument that co-defendant Benito Nunez took "the Government's money to learn how to commit crimes against the Government" (T.937, 950). The premise of this argument -- that Mr. Nunez had accepted a \$1,500 grant from the United States Government to take the course -- was not a fact in evidence.* The message behind this accusation was apparent: Mr. Nunez was, by nature, a cheat, and therefore all the more inclined toward counterfeiting. The fact that this assault was waged against Benito Nunez does not obviate any prejudice against Jose Nunez; as we have noted in Point II, supra, the Government made every effort to commingle the identities of the defendants and the evidence offered against each, and as a result, evidence accusing Benito Nunez of bad character could not have but reflected negatively upon Jose Nunez. Thus, both defendants suffered severe prejudice by reason of an argument based on a fact not in evidence, and as this Court stated with regard to a similar argument, "A prosecutor's misrepresentation of testimony may require reversal because of the inevitable prejudice to the defendant." (Citations omitted.) United States v. Drummond, 481 F.2d 62, 64 (2d Cir. 1973); cf. Hall v. United States, 419 F.2d 582, 585-586 (5th Cir. 1969).

*There had been evidence that Mr. Perez, the Government's informant, had accepted a \$1,500 grant from the United States Government to attend the program on police practices, but there was no such evidence that Mr. Nunez had received a like grant.

~~are worthy~~ two other actions by the Government attorney are worthy of note. One was his lapse into harsh language, such as his description of a defense contention as "ludicrous" and particularly his characterization of the defendants as "criminals of the first order." The second was his comments suggesting a negative inference from the defendants' failure to testify, such as his description of Allen Miller's testimony of the defendants' possession of the counterfeit bills as "uncontradicted" and his comparison of the Government's production of "evidence at this trial, and plenty of it" to the defense's production of "arguments, hypotheses and speculations" (T.928-929, 959-960).^{*} Both categories of comment repeatedly have been condemned as unjustified by this Court. As to the use of epithets or shorthand disparagements, this Court has found "[no] justification for the prosecutor's remarks in the case law." United States v. Benter, 457 F.2d 1174, 1177-1178 (2d Cir. 1972); see also United States v. Fernandez, 480 F.2d 726, 741-742, n.23 (2d Cir. 1973); see generally Hall v. United States, 419 F.2d 582, 597 (5th Cir. 1969). As to indirect

^{*}Although the court charged that no inference could be drawn from the defendants' failure to testify (T.1039-1040), the Government attorney's statements were not neutralized by the court's charge, which was given the following day. Cf. Coleman v. Denno, 223 F.Supp. 938, 943-944 (S.D.N.Y. 1963), aff'd., 330 F.2d 441 (2d Cir.), cert. denied, 377 U.S. 1003 (1974).

comments regarding the defendants' failure to testify, this Court has applied the following formula: "Was the language used manifestly intended to be, or was it of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify?" United States ex rel. Leak v. Follette, 418 F.2d 1266, 1269 (2d Cir. 1969). Certainly, the express comparison between the Government's presentation of "evidence at this trial, and plenty of it" to the defense's "arguments, hypotheses, and speculations" was an intended and successful reference to the failure of either of the defendants to testify; and the claim that the Government's testimony on the defendants' possession of counterfeit bills in the presence of Mr. Miller was "uncontradicted" -- usually deemed to be an acceptable comment by the prosecutor -- was improper as one of the "exceedingly rare case[s] where the defendant alone could possibly contradict the Government's testimony." United States ex rel. Leak v. Follette, supra, at 1269.

At the conclusion of the summation, out of the presence of the jury, defense counsel moved for a mistrial based on the Government attorney's final remarks. Counsel had carefully avoided voicing his objections to various statements while the jury was present because, after having objected to an inflammatory argument at an early moment in the summation, he was instructed by the court that it did not "look kindly upon objections to summations" (T.921). Thus, counsel's failure to

~~interruption of the Government attorney's summation on the numerous~~
occasions when an improper comment was made must be attributed
to counsel's desire to abide by the court's preference rather
than to his approval of such comments.*

There were substantial grounds upon which the jury could
return a guilty verdict against Benito Nunez alone (see Point II,
supra); there can be no assurance that the verdict against
Jose Nunez was based on a review of the evidence rather than
on the fear and prejudice of the jury, artfully manipulated
by the Government attorney. The Government attorney's comments
on the defense's cross-examination of Mr. Perez or his appeal
to the fears and prejudices of the jurors in his closing remarks
would itself constitute grounds for a new trial. But the ad-
ditional improprieties cited -- his argument from a fact not in
evidence, his harsh language, and his indirect comment on the
failure of the defendants to testify -- reveal a persistent
pattern of misconduct which compels that a new trial be ordered.

*One of the statements challenged in this point -- the
Government attorney's attack on the defense cross-examination
of the informant -- preceded the court's request that counsel
refrain from objecting. No doubt counsel's failure to object
at that point was not an intended waiver, but a natural reluc-
tance to cut into his adversary's summation at such an early
point (which might appear obstreperous to the jury and be con-
trary to the court's preferences with which counsel may have
been familiar). Alternatively, we would submit that the com-
ment in question was so serious an impropriety as to constitute
plain error.

Point IV

THE MAXIMUM PROBATION PERIOD IMPOSABLE ON
A SPLIT SENTENCE UNDER 18 U.S.C. §3651 MAY
NOT EXCEED THE LENGTH OF THAT PORTION OF
THE ORIGINAL SENTENCE WHICH HAS BEEN SUS-
PENDED BY THE COURT.

Judge Pratt imposed a three-year sentence of imprisonment on Jose Nunez, but, pursuant to 18 U.S.C. §3651, ordered it served as a split sentence: six months in a jail-type institution and suspension of the balance of the sentence. However, he ordered that the period of probation be four years, to begin upon termination of the six-month jail sentence. Though a split sentence was clearly lawful and appropriate here, Judge Pratt miscalculated the length of the probationary term permissible under the relevant provision of 18 U.S.C. §3651. The judge read the statute as authorizing any probationary term up to five years. We respectfully submit that when a split sentence under the second paragraph of §3651 is imposed, the maximum probationary term available is the length of the sentence that has been suspended.*

Paragraph two of 18 U.S.C. §3651 provides that when a sentence for an offense other than one punishable by death or life imprisonment, in excess of six months, is authorized, the

*Though the court might, at some later date and for good cause shown, extend the period of probation (to a maximum of five years) under the fourth paragraph of §3651, that cannot rectify the initial error in sentencing which we address.

court

... may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.

There is an ambiguity at the conclusion of the quoted passage in that neither punctuation nor syntax establishes whether the phrase "for such period" (relating to the length of probation) is a reference to the preceding phrase "remainder of the sentence" or is an independent term qualified by the subsequent phrase "as the court deems best." If it is a reference back, the statute clearly limits the period of probation on a split sentence to the length of sentence suspended: "... the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period...." If the phrase is to be subsequently qualified, the statute might appear to authorize a probationary term up to five years regardless of the sentence originally imposed: "... the defendant placed on probation for such period and upon such terms and conditions as the court deems best." It appears that the language may be interpreted to support either result, which would require the more lenient interpretation we urge:

[A]s we have recently reaffirmed, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."
Rewis v. United States, 401 U.S. 808, 812 (1971) (additional citations omitted)....

Thus, where there is an ambiguity in a criminal statute, doubts are resolved in favor of the defendant.

United States v. Bass, 404
U.S. 336, 347-348 (1971).

Nevertheless, if reference to other materials is deemed appropriate, such sources justify the conclusion that the probationary term may not exceed the length of sentence suspended.

In United States v. Teresi, 484 F.2d 894 (7th Cir. 1973), a panel of the Seventh Circuit (including now Justice Stevens) was asked to construe the following judgment: the three-year sentence was suspended and the defendant was placed on probation for three years; one condition to the probation was that at some unspecified date during the first two-and-a-half-year probation period, subsequently determined by the court, the defendant was to be surrendered to the custody of the Attorney General for a period of six months; but as to that condition, if the court did not in its discretion order the defendant to surrender, the condition was null and the defendant was to serve the entire period of three years on probation. Id. at 896.

The Seventh Circuit found this sentence to be other than one specifically defined in 18 U.S.C. §3651 due to the floating six-month prison term. Nevertheless, the court declined to find the sentence void; and it concluded that, since the defendant had begun his sentence of probation, double jeopardy and the terms of 18 U.S.C. §3651 required a sentence no more

severe than a three-year sentence of imprisonment with execution suspended and probation ordered for three years. Id. at 897-899. The court expressed its view that the period of probation under a split sentence was limited to the length of the sentence suspended:

18 U.S.C. §3651, second paragraph, would authorize a sentence of imprisonment for three years, with confinement for six months, execution of two and one-half years suspended, and defendant placed on probation for such period, subject to condition stated with respect to defendant's daughter.

Id. at 897.

Thus, the court appears to have been of the view that the term of probation allowed upon a split sentence was equal to the portion of the sentence which had been suspended.

This interpretation is consistent with the legislative history of the second paragraph of 18 U.S.C. §3651. This provision, enacted as Pub.L.No. 85-741 (72 Stat. 834), is entitled "One-Count Indictment -- Confinement," and Senate Report No. 2135, reprinted in [1958] U.S. Code Cong. § Admin. News 3841-3843, also reflects the statute's concern for sentencing under one-count indictments:

Purpose

The purpose of the proposed legislation, as amended, is to amend section 3651 of title 18, United States Code, so as to permit confinement for a period not exceeding 6 months in connection with the grant of probation on a 1-count indictment.

Statement

...

Under existing law (see 3651, title 18, U.S.C.), where a defendant is convicted of any offense not punishable by death or life imprisonment, the court may suspend the sentence and place the defendant on probation.

It is clear that in such a case the court, under existing law, must suspend the sentence and place the defendant on probation.

There are many instances, however, where Federal judges feel that it would be in the public interest for probation to be granted only after the defendant has served a part of a sentence, that there should be some confinement before a grant of probation rather than having probation granted in place of the whole sentence.

In practice, Federal judges have long achieved this result where a defendant is convicted on 2 or more counts by sentencing the defendant to some confinement on 1 count and granting probation on another count.

The proposed legislation, which applies only to those instances where the court now has authority to grant probation, would permit a similar result to be achieved in the case of a one-count indictment....

This analysis establishes that when only a single sentence of imprisonment is authorized because there is a conviction on a single count, Congress, by this provision of §3651, intended to enable a judge to include in the single sentence two types of punishment. Thus, in determining the precise dimensions of a split sentence, the combined length of the term of custody and the term of probation must not be greater than the single sentence imposed pursuant to the conviction for the single

count. A three-year sentence of imprisonment may be divided into six months in jail and two and a half years on probation, for the sum of the sentences is three years. To derive a six-month jail sentence plus a four-year probation sentence from a three-year sentence, however, is no longer a division of the three-year sentence, since the component sentences exceed the actual sentence in length. They constitute not one, but two, sentences. It was legislative recognition of the fact that two sentences cannot be imposed on a single indictment count that gave rise to the special provision for splitting sentence.

We respectfully urge this Court to adopt this interpretation of 18 U.S.C. §3651, and, consistent with that position, to reduce the term of probation imposed in the case at bar to two and a half years. Moreover, in light of the potential confusion which may result from the ambiguous language of the statute, we respectfully request this Court to clarify this question regardless of the disposition of our three earlier points, each of which seeks reversal of the judgment and a new trial.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and a new trial ordered; in any case, this Court should resolve the question raised on Point IV.

Respectfully submitted,

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CERTIFICATE OF SERVICE

May 13, , 1977

I hereby certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Steven Lloyd Barnett